RE LAU HIENG YEE

HIGH COURT SABAH & SARAWAK, SIBU
TEE AH SING J
[ORIGINATING SUMMONS NO: 24-108 OF 1999]
30 JULY 1999

BANKRUPTCY: *Capacity of bankrupt - Application to leave Malaysia - Appointment of solicitor - Whether requires consent of Official Assignee - International passport of bankrupt - Whether vests in Official Assignee - Section 38(1)(a) Bankruptcy Act 1967 - Applicability - Bankruptcy Act 1967, ss. 2, 24(4), 38(1)(a), 38(1)(c) - Bankruptcy Rules 1969, r. 18(1) - Rules of the High Court 1980, O. 7 r. 2*

BANKRUPTCY: *Practice and procedure - Application to leave Malaysia - Application made by originating summons pursuant to Rules of the High Court, 1980 - Whether improper - Whether should be by way of summons in chambers pursuant to Bankruptcy Rules 1969 - Whether there is a lacuna - Rules of the High Court 1980, O. 7 r. 2 - Bankruptcy Rules 1969, rr. 18(1), 274, 276*

The applicant, an undischarged bankrupt, had applied to the High Court for an order that he be allowed to travel overseas and had engaged a solicitor to act for him in the application. The application was made by an *ex parte* originating summons pursuant to O. 7 r. 2 Rules of the High Court 1980 ('the RHC'). Before the learned judge, the Official Assignee ('the OA') argued, by way of preliminary objections, that the application was unmaintainable as: (i) the applicant had not obtained the OA's consent to appoint a solicitor, and had thus contravened s. 38(1)(a) of the Bankruptcy Act 1967 ('the BA'); and (ii) the application should have been made by summons in chambers, and not by originating summons, pursuant to r. 18(1) of the Bankruptcy Rules 1969 ('the BR'). The applicant contended that consent was unnecessary as the application did not concern his property. The applicant further maintained that the application was a summons in chambers application, as the format used is to summon the parties to the judge in chambers. The primary questions that arose were: (i) whether s. 38(1)(a) of the BA applies; and (ii) whether it was improper of the applicant to have proceeded by way of originating summons, and if so whether such impropriety was fatal to his application.

Held:

[1] The exception in s. 38(1)(a) clearly indicates that the section is intended to apply only to actions for recovery of something – either real or personal – which can be turned into assets, such as a claim for recovery of property or money due.

[2] The provision of s. 38(1)(a) of the BA does not apply. The international passport of the applicant cannot be turned into an asset for payment of debts to the creditors. The international passport, therefore, does not come within the ambit of the definition of 'property' in s. 2 of the BA. That being so s. 24(4) of the BA does not apply with the result that the international passport does not vest in the OA.

[2a] There is nothing in s. 38(1)(c) of the BA to indicate that it is the intention of the legislature to require prior sanction of the OA before a bankrupt can apply to the court for permission to leave Malaysia. As such, the applicant is entitled to engage an advocate and solicitor to represent him in the application.

[3] The applicant was adjudged a bankrupt pursuant to a bankruptcy petition brought by the petitioning creditor. The bankruptcy petition, however, was duly disposed off and ceased to be pending. That being so, r. 18(1) of the BR which provides that 'except where these rules or the Act otherwise provide, every application to the court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit' is not applicable.

[3a] There is no form whatsoever prescribed as to what is the summons in chambers under the BA and the BR. Since there is a lacuna, by virtue of Rule 276 of the BR, resort can be had to the RHC. So, in the present case, the application by originating summons under O. 7 r. 2 of the RHC is the proper procedure as there is no matter pending.

[4] In any case, non-compliance under Rule 18(1) of the BR is a mere irregularity curable by Rule 274 of the BR. In the circumstances, it is imperative for the court to allow the *ex parte* summons to prevail notwithstanding that the same application should have been made by summons in chambers in the first place.

[Preliminary objections overruled.]

Case(s) referred to:
Re Khoo Kim Hock [1974] 2 MLJ 29 ***(foll)***
Sharifah Aini Syed Jaafar v. Karangkraf Sdn Bhd [1989] 2 CLJ 1269 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 2, 38(1)(c)
Bankruptcy Rules 1969, r. 18(1)
Federal Constitution, art. 5(1)
Rules of the High Court 1980, O. 7 rr. 2, 7

Other source(s) referred to:
Mallal's Supreme Court Practice, vol 1, para 32/1/1

For the applicant - Joseph Tang; M/s Tang & Co
For the official assignee - Rohatul Akmar (Salamah Mohd Nawei with her)

Reported by WA Sharif

JUDGMENT

Tee Ah Sing J:

This is an *ex parte* originating summons under O. 7 r. 2 of the Rules of the High Court ("the RHC"), s. 38(1)(c) of the Bankruptcy Act 1967 ("the BA") and art. 5(1) of the Federal Constitution by the applicant for an order that permission be granted to the applicant to leave Malaysia and to enable him to travel overseas during the period between 1 December 1998 to 30 November 2003 on such terms as the court may deem just.

On 7 May 1999 I ordered that this *ex parte* originating summons should be served on the Official Assignee ("the OA").

On 20 May 1999 when this matter came for hearing Cik Rohatul Akmar for the OA raised two preliminary objections.

Firstly she submitted that the applicant who is a bankrupt did not get permission of the OA to appoint a solicitor to act on his behalf in this action as required by s. 38(1)(a) of the BA. In this case the action vest in the OA because it does not concern injury to the bankrupt person. In support the case of *Sharifah Aini binte Syed Jaafar v. Karangkraf Sdn. Bhd.* [1989] 2 CLJ 1269 was cited. Her second objection was that the application should have been made by summons in chambers as required by r. 18(1) of the Bankruptcy Rules 1969 ("the BR") and not by *ex parte* originating summons.

Mr. Joseph Tang for the applicant submitted that looking at s. 38(1)(a) of the BA on the first glance it would appear that except in an action for personal injuries the bankrupt has no right to make application or to do any other act. This type of interpretation will give rise to absurdity. So in the case of a bankrupt having matrimonial problems and if the contention of the OA stands he cannot apply for a divorce or for any relief. In so far as the OA is concerned the OA is the trustee of all the creditors and only in the case of financial matters touching the property of the bankrupt then consent is required. In support the case of *Re Khoo Kim Hock* [1974] 2 MLJ 29 was cited.

In respect of the second objection he submitted that there is no form whatsoever prescribed as to what is the summons in chambers under the BA and the BR. However, as there is a lacuna we have to refer to r. 276 of the BR.

The present application is a summons in chambers. It is an *ex parte* originating summons and it is governed by O. 7 r. 7 of the RHC and the relevant form is Form 7. The format there is to summon the relevant parties to the judge in chambers. The contents is exactly the same as the summons in chambers prescribed by the RHC. Under the RHC, the format for summons in chambers cannot be used except in pending cause or matters. This means that any original application made to the High Court must be by originating summons. *Mallal's Supreme Court Practice* at p. 393 was cited.

Cik Rohatul Akmar in reply submitted that the passport of the bankrupt is the property of the OA. Rule 18 of the BR is clear that the application should be by summons in chambers. There is no lacuna in this matter.

I shall now deal with the preliminary objections raised.

In the case of *Re Khoo Kim Hock* [1974] 2 MLJ 29 His Lordship Mohamed Azmi J (as he then was) at p. 30 said:

> On the question of incompetency of an undischarged bankrupt to maintain court action, s. 38(1)(a) provides:
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> > Where a bankrupt has not obtained his discharge – the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.
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> The first question for determination is whether the requirement of sanction of the Official Assignee under s. 38(1)(a) applies only to a bankrupt's ordinary claims, i.e. maintaining court action involving third parties, or does it extend to all actions including proceedings, as in the present case, where the bankrupt is challenging the very validity of the adjudication order by which he has been adjudged bankrupt. Having considered the provisions of the Bankruptcy Act as a whole and the section itself, it is my considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he is seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction. The exception contained within brackets in s. 38(1)(a) clearly indicates that the section is intended to apply only to actions for recovery of something – either real or personal – which can be turned into assets such as a claim for recovery of property or money due. Further, there is nothing in ss. 33, 92 or 105 to indicate that it is the intention of the legislature to require prior sanction of the Official Assignee before a bankrupt can seek relief under those provisions. Under s. 33(1), a bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and there is no legal requirement that for this purpose he should first obtain the sanction of anyone. This is also the case where an application is made to the court under ss. 92(1) and 105(1) of the Act. It is true that s.

> 24(4) provides that when a debtor is adjudged bankrupt his property shall become divisible amongst his creditors and shall vest in the Official Assignee. The word "property" is defined by s. 2 to include money, goods, things in action, land and every description of property, whether real or personal, obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined. As such, only property as defined above would vest in the Official Assignee at the time of adjudication, and from the definition, unless something can be turned into an asset for payment of debts to the creditors it cannot be described as property within the meaning of s. 2. The present application being not things in action or chose in action cannot be described as something which can be turned into asset for the estate of the bankrupt.

I respectfully adopt His Lordship's reasoning as to what is the meaning of the word "property" in s. 2 of the BA.

In our case the international passport of the applicant cannot be turned into an asset for payment of debts to the creditors. So I am of the view that the international passport of the applicant does not come within the ambit of the definition of "property" under s. 2 of the BA. As such s. 24(4) of the BA has no application. In other words, the international passport of the applicant does not vest in the OA.

Section 38(1)(c) of the BA reads as follows:

> 38(1) Where a bankrupt has not obtained his discharge ...
>
> (c) the bankrupt shall not leave Malaysia without the previous permission of the Official Assignee or of the court;

Further, there is nothing in s. 38(1)(c) of the BA to indicate that it is the intention of the legislature to require prior sanction of the OA before a bankrupt can apply to the court for permission to leave Malaysia.

In *Re Khoo Kim Hock* [1974] 2 MLJ 29 His Lordship Mohamed Azmi J (as he then was) at p. 31 concluded as follows:

> ... If it is the intention of the legislature to curtail the right of a bankrupt to engage an advocate and solicitor in all cases, it would expressly say so in s. 17. In the absence of such express prohibition in the Act, I rule that an undischarged bankrupt in this country is entitled to engage an advocate and solicitor to represent him in any action where the provision of s. 38(1)(a) does not apply, or where the cause of action does not vest in the Official Assignee.

In our case the application by the applicant does not vest in the OA. I am also of the view that the provision of s. 38(1)(a) of the BA does not apply. As such the applicant who is an undischarged bankrupt is entitled to engage an advocate and solicitor to represent him in this application. I overrule the first preliminary objection.

In *Mallal's Supreme Court Practice* vol. 1, the relevant part of para. 32/1/1 reads as follows:

> A summons in chambers cannot be issued except in a pending cause or matter: *Re Sin Teck Hong Oil Mills Ltd.* [1950] MLJ 232.

In our present case the applicant was adjudged a bankrupt pursuant to a bankruptcy petition brought by the petitioning creditor. In this application the petitioning creditor cannot be cited as a party. Therefore the bankruptcy petition was duly disposed off and ceased to be pending. So, I am of the view that r. 18(1) of the BR which provides that "except where these Rules or the Act otherwise provide, every application to the court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit" is not applicable.

Since there is a lacuna in the BR by virtue of r. 276 of the BR resort can be had to the RHC.

So, in the present case, the application by originating summons under O. 7 r. 2 of the RHC is the proper procedure as there is no matter pending.

Even if I am wrong in holding that the application did not contravene r. 18(1) of the BR, I am of the view that the non-compliance under r. 18(1) of the BR can be said to be a mere irregularity curable by r. 274 of the BR which reads as follows:

> Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceeding void unless the court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such term as the court may think fit.

As adverted to earlier, I had ordered that this *ex parte* originating summons to be served on the OA. By such an order I had made it into an *inter partes* hearing. So the OA was never prejudiced in any event. In such a circumstance, it is imperative for this court to exercise its discretionary power to allow the *ex parte* originating summons to prevail, notwithstanding that the application should have been by summons in chambers in the first place.

I overrule the second preliminary objection.

In view of the foregoing, I overrule the preliminary objections of the OA.

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